Supreme Court, U.S.
FILED

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No. [illegible]

In The

# Supreme Court of the United States

October Term, 1995

\$227,865.00 U.S. CURRENCY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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43 pp

## QUESTIONS PRESENTED FOR REVIEW

### I.

WHETHER THE COURT OF APPEALS COMMITTED ERROR IN FINDING NO ABUSE OF DISCRETION BY THE DISTRICT COURT IN PERMITTING THE GOVERNMENT TO USE ILLEGALLY SEIZED EVIDENCE TO ESTABLISH PROBABLE CAUSE FOR CIVIL FORFEITURE.

### II.

WHETHER DUE PROCESS WAS DENIED BY THE COURT OF APPEALS' ERROR IN FAILING TO ORDER THE DISTRICT COURT TO REQUIRE THE GOVERNMENT TO PROVE A NEXUS BETWEEN DEFENDANT CURRENCY AND DRUG TRAFFICKING; ERRONEOUSLY SHIFTING THE BURDEN OF PROOF TO CLAIMANT.

## LIST OF PARTIES TO THE PROCEEDINGS BELOW

United States of America

Ernest House (Claimant)

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3. Order of the United States Court of Appeals for the Ninth Circuit, No. 94-55796, denying petition for rehearing and rejection of suggestion for rehearing en banc, filed January 30, 1996. (App. 19)

4. Notice of Lodging of Reporter's Transcript of Court's Findings of Fact and Conclusions of Law, filed May 6, 1994. (App. 7)

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## STATEMENT OF SUPREME COURT JURISDICTION

Petitioner herein respectfully seeks review of the Opinions of the United States Court of Appeals for the Ninth Circuit as set forth in its unpublished memorandum opinion entered on December 18, 1995.

On January 30, 1996, the United States Court of Appeals for the Ninth Circuit entered an Order denying Petitioner's Petition for Rehearing and rejected Appellant's suggestion for a rehearing en banc.

Petitioner believes that 28 U.S.C. Section 1254(1) confers jurisdiction upon this Honorable Court to review the Judgment or Decree in question by writ of certiorari.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

**United States Constitution, Amendment V**, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**28 U.S.C. Section 1254(1)**, "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

**21 U.S.C. Section 881(a)(6)** "(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them: (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all

moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, accept that no property shall be forfeited under this paragraph, to extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

## STATEMENT OF PROCEEDINGS AND DISPOSITION

This case involves in rem proceedings brought by Respondent, the United States of America (hereinafter referred to as "government"), against Petitioner, $227,865.00 in United States Currency. The government filed a complaint in this matter on December 21, 1992, and Petitioner filed an answer on March 4, 1993. On January 24, 1994, Petitioner filed a Motion to Suppress Evidence. On February 11, 1994, the Motion to Suppress Evidence was denied by the District Court. A rehearing of the Motion to Suppress Evidence was sought prior to trial and was also denied by the District Court. Trial was conducted by the District Court on March 25, 1994, March 28, 1994, and April 18, 1994. On April 20, 1994, the District Court entered a Judgment forfeiting Petitioner, $227,865.00 in United States Currency to the government. Petitioner appealed this Judgment to the United States Court of Appeals for the Ninth Circuit. On December 18, 1995, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court in an unpublished Memorandum Opinion. On January 30, 1996, the United States Court of Appeals for the Ninth

Circuit entered an Order denying Petition for Rehearing and rejected the suggestion for a rehearing en banc.

## STATEMENT OF FACTS

On August 1, 1992, at approximately 2:50 a.m., uniformed officers of the California Highway Patrol observed a Lincoln being operated on northbound Interstate 405. At that time the Highway Patrol officers observed the vehicle changing lanes without using a turn signal, creating a hazard with a jeep. The officers pulled behind the Lincoln, turned on their red and blue lights and directed the driver to exit the freeway, and the driver complied.

The Lincoln was approached by the Highway Patrol officers at a gas station where it had stopped and they requested driver's license and registration from the Claimant, Ernest House. At that time the Claimant kept his hands about shoulder level and pointed down with his index fingers to a handgun on the floorboard, propped up against the transmission well in plain view.

The Claimant, Ernest House, was placed under arrest for possessing a concealed handgun in the car. The handgun was not loaded when seized and the arresting officer testified at trial that Claimant was "possibly not trying to conceal the handgun." After Claimant was placed under arrest, the Highway Patrol officers conducted an inventory search of his vehicle. This inventory search included going into the trunk where Defendant Currency was discovered in a gym bag.

The currency was seized by officers of the California Highway Patrol and delivered to a detective assigned to Asset Forfeiture with the City of Los Angeles Police Department.

The seized currency ($227,865.00) was turned over to the government via agents of the Drug Enforcement Administration. The government claimed the right to forfeit the seized currency contending that it was derived from illegal drug transactions.

The Claimant denied that the source of the seized currency was from drug trafficking and presented evidence at trial that the currency was derived over a four or five year period from gambling in Las Vegas.

Prior to trial, the District Court rejected Claimant's Motion to Suppress Evidence and Motion for Rehearing of same. The gist of these motions was that Claimant had not violated any State of California firearms laws and therefore the highway patrol officers had no probable cause to arrest Claimant and search his vehicle incident thereto. Further, the District Court committed error in prematurely shifting the burden of proof to Claimant when the government had initially failed to establish the requisite nexus between the seized currency and drug trafficking. Last, the District Court committed error in finding that Claimant failed to establish a lawful source of the seized currency, despite the fact that the government failed to offer any evidence in rebuttal of Claimant's presentment of Las Vegas gambling receipts far in excess of the amount of the seized currency.

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

**I. Certiorari is warranted because federal jurisprudence is not settled concerning the quantum of evidence required for the government to establish the requisite probable cause, and in particular, the nexus between seized currency and drug trafficking in civil forfeiture cases brought pursuant to 21 U.S.C. Section 881(a)(6).**

In the case at bar, the United States Court of Appeals for the Ninth Circuit has sanctioned a departure from the accepted and usual course of judicial proceedings by the United States District Court Central District of California and has rendered a decision contrary to the United States Constitution, Amendment V. In addition, this decision is in conflict with the United States Court of Appeals for the Sixth Circuit and in conflict with a prior decision of the Ninth Circuit, on the same matter. Further, the United States Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Honorable Court. In filing its Memorandum Opinion, the Court of Appeals chose to ignore its prior decision in *United States v. U.S. Currency, $30,060.00* 39 F.3d 1039 (9th Cir. 1994), despite the fact that the Court of Appeals was specifically notified of this decision by Claimant prior to its reaching its decision in this case. (see Presentment of Additional Citations Pursuant to Notice of the Court, App. 20. In *United States v. U.S. Currency $30,060.00, supra,* the Court of Appeals *affirmed* the Judgment of the District Court entered in favor of the Claimant.

The facts contained in *United States v. U.S. Currency $30,060.00, supra,* are virtually identical to the case at bar. In that case, a narcotics detection dog alerted to the presence of controlled substance on money found in the claimant's automobile during a traffic stop, the money was packaged in $1,000 bundles and corresponded to the price of two kilograms of cocaine, *and the claimant gave false account of the money's source and his own employment record.*

In *United States v. U.S. Currency $30,060.00, supra,* the Ninth Circuit held that this evidence was *insufficient to establish probable cause* that the money was connected to drugs. In fact, that Court specifically found that "The government [also] points to circumstantial evidence regarding the large amount of . . . money and [his] false accounts of the money's source and [his own] employment record. While this evidence may support *a suspicion of illegal activity, a mere suspicion of illegal activity is not enough to establish probable cause that the money was connected to drugs*". *Id.*, at 1040 (emphasis added).

The Court of Appeals also chose to ignore the holding in *U.S. v. $5,000.00 in U.S. Currency,* 40 F.3d 846 (6th Cir. 1994) which was also pointed out to the Court of Appeals prior to its decision (see Presentment of Additional Citations Pursuant to Notice of the Court App. 20). In *U.S. v. $5,000.00 in U.S. Currency, supra,* the Sixth Circuit held that the government failed to establish probable cause to support forfeiture of $5,000.00 in currency carried on the person of one claimant at the airport and $9,750.00 carried in the luggage of another claimant. In that case the facts consisted of the following:

1. One claimant matching, to the extent of being a well-dressed black man wearing glasses, the drug courier description provided by an anonymous caller;

2. Claimants had traveled to New York for a single day and the large amount of currency was found in bundles and wrapped with rubber bands;

3. A narcotics detection dog alerted to the money;

4. One claimant lied about the purpose of his trip; and

5. The other claimant had plead guilty to state drug charges more than six years previously. The Sixth Circuit recognized that these facts relied on by the government presented only suspicion that claimants were involved in some drug transaction; however, " . . . a more substantial showing of a connection between the money and drug activity is required . . . " *Id.*, at 850.

In the case at bar, the Court of Appeals found that the amount of the seized currency and the fact that Claimant was carrying that amount of money in the trunk of his Lincoln at 2:00 a.m., armed with a pistol (unloaded) at that time " . . . is persuasive circumstantial evidence to support probable cause." (page 4 Memorandum Opinion, App. 1). This finding is clearly contrary to the prior decision of the Ninth Circuit in *United States v. U.S. Currency $30,060.00, supra,* and in conflict with the decision of the Sixth Circuit in *U.S. v. $5,000.00 in U.S. Currency, supra;* especially since the record in the District Court reveals that Claimant in the case at bar has *never* been convicted of any drug related offenses.

**II. The Court of Appeals committed error in finding no abuse of discretion by the District Court in permitting the government to use illegally seized evidence to establish probable cause for civil forfeiture.**

In its Memorandum Opinion filed December 18, 1995, the Court of Appeals held that "We therefore conclude that the district court did not err in holding that the officer had probable cause to arrest House for violating Section 12025(a), and thus did not abuse its discretion by denying House's motion to suppress the evidence offered at the forfeiture trial." (page 3 of Memorandum Opinion, Appendix Item 1). The Court of Appeals supported its position by relying on the holdings of *People v. Koehn*, 25 Cal. App. 3d 799, 802, 102 Cal. Rptr. 102, 104 (1972); *Wilson v. Porter*, 361 F.2d 412, 414, 416 (9th Cir. 1966); *People v. Hale*, 43 Cal. App. 3d 353, 356, 117 Cal. Rptr. 697, 698 (1974). These cases hold that a pistol is concealed for purposes of California Penal Code Section 12025(a) if at least *some* part of the pistol is hidden.

The undisputed facts as presented in the record of the District Court are:

1. The firearm was not loaded;

2. At the time of the Claimant's arrest he pointed out the handgun to the arresting officers on the floor board of the Lincoln propped up against the transmission well *in plain view;*

3. No part of the handgun was concealed by any action of the Claimant;

4. The arresting officer testified at trial that the Claimant was "possibly not trying to conceal the handgun;"

5. Claimant was never charged by the State of California with committing any criminal offense relating to his possession of the unloaded handgun in his Lincoln.

In its Memorandum Opinion, the Court of Appeals acknowledged "[Although] a pistol isn't 'concealed' for purposes of section 12025(a) merely because it is inside the vehicle, *see People v. Frost*, 125 Cal. App. Supp. 794, 796 (1932)" (page 2 Memorandum Opinion, App. 1). In *People v. Jurardo* 25 Cal. App. 3d 1027, 102 Cal. Rptr. 498 (1972) it was held that "In the case at bench the court did instruct the jury that for the crime of possession, there must be criminal intent and 'Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent . . . ' ". Therefore, the Court of Appeals committed error in sanctioning the District Court's abuse of discretion in denying Claimant's Motion to Suppress Evidence where even the testimony of the arresting officer did not claim that the unloaded handgun was not concealed. The action of the District Court in denying that motion was a departure from the accepted and usual course of judicial proceedings.

The focus of an inquiry into criminal conduct must necessarily be on the actions of the accused. The carrying of an unloaded handgun in a motor vehicle, not concealed, is not illegal in the State of California. Under the circumstances in the case at bar, the vantage point of the viewing police officer, with reference to the handgun, cannot be controlling. The record is uncontroverted that

the Claimant pointed out the presence of the unloaded handgun to the arresting officer *prior* to any type of search of Claimant's Lincoln being conducted. The District Court committed error in refusing to apply the exclusionary rule and the Court of Appeals committed error in affirming that decision. The arresting officers had no probable cause under California law to arrest Claimant for possession of a handgun in a motor vehicle contrary to California Penal Code Section 12025(a). In fact, no criminal charges were ever filed against Claimant. Therefore, the inventory search of Claimant's Lincoln, prior to his arrest, resulting in the discovery of the seized currency contained in a gym bag in the trunk should not have been condoned by the Court of Appeals.

The Court of Appeals erroneously concluded " . . . that the district court did not err by finding probable cause to arrest House, the exclusionary rule is inapplicable in *this* case even though House correctly notes that it can be applied in what he calls 'quasi-criminal' forfeiture proceedings" (page 3 Memorandum Opinion, App. 1). Had the exclusionary rule been properly applied by the District Court or the Court of Appeals, the seized currency would have been suppressed and the government would have been unable to establish the requisite probable cause to justify forfeiture of the currency.

**III. The Court of Appeals committed error in denying due process by failing to order the District Court to require the Government to prove a nexus between defendant currency and drug trafficking and erroneously shifted the burden of proof to Claimant.**

In its Memorandum Opinion, the Court of Appeals procedurally acknowledged that in civil forfeiture actions pursuant to 21 U.S.C. Section 881(a)(6) the government must initially establish probable cause to believe that the seized money was connected to drugs. If it does, the burden then shifts to the Claimant to prove by a preponderance of the evidence that the seized currency was not involved with an illegal drug transaction. If the Claimant fails to carry this burden, the money is forfeited. (pages 3-4 Memorandum Opinion, App. 1).

The Court of Appeals' decision contained in its Memorandum Opinion (App. 1) is contrary to the United States Constitution, Amendment V, in that it failed to hold the government to its due process burden of establishing probable cause that the seized currency was connected to drugs. In the case at bar, due process was abrogated when both the District Court and the Court of Appeals sanctioned the shifting of the burden of proof to the Claimant, requiring him to prove a lawful source for the seized currency. However, the government had first failed to establish the requisite probable cause of a nexus between the seized currency and drug trafficking.

The Court of Appeals erroneously ratified the finding of the District Court, finding that the government established probable cause for forfeiture of the seized currency. The Court of Appeals affirmed the District Court's

finding of probable cause to justify the forfeiture of Defendant Currency by relying on the following evidence:

1. " . . . the mere presence of almost a quarter of a million dollars in House's trunk is itself 'strong evidence that the money was furnished or intended to be furnished in return for drugs'." (page 4 Memorandum Opinion, App. 1);

2. " . . . the fact that House was carrying that amount of money in his trunk at 2:00 a.m., and that he was armed with a pistol at that time is persuasive circumstantial evidence to support probable cause." (page 4 Memorandum Opinion, App. 1); and

3. " . . . House's apparent failure to file legitimate tax returns for several prior years, and his obvious attempt to fabricate such returns to show a legitimate source, also are relevant to the probable cause issue." (page 4 Memorandum Opinion, App. 1).

The inferences drawn from these facts by the District Court and the Court of Appeals are clearly erroneous. The presence of the seized currency, at best, only gives rise to a mere suspicion of illegal activity. *United States v. U.S. Currency $30,060.00*, 39 F.3d 1039 (9th Cir. 1994); *U.S. v. $5,000.00 in U.S. Currency*, 40 F.3d 846 (6th Cir. 1994).

It is axiomatic that the finder of fact cannot engage in surmise, conjecture, or speculation. If the inference of "suspicion of illegal activity" is adopted by the Court of Appeals from the mere presence of the seized currency, the Court is not then free to infer that the "illegal activity" must necessarily be drug trafficking. Similarly, the

time of day and the fact that Claimant was armed with a pistol is of no moment in terms of proving a nexus between the seized currency and drug trafficking. The law of evidence is well established that the finder of fact cannot base inference upon inference. *Fegles Const. Co. v. McLaughlin Const. Co.*, 205 F.2d 637 (9th Cir. 1953); *Brittain v. Travelers Ins. Co.*, 70 F.Supp. 116 (D. Mont. Ct. 1945); *Orrill v. Prudential Life Ins. Co. of America*, 44 F.Supp. 902 (N.D. Cal. 1942).

After erroneously shifting the burden of proof to the Claimant, the District Court and the Court of Appeals simply ignored substantial evidence documenting Claimant's legitimate gambling winnings in Las Vegas, Nevada, far in excess of the amount of Defendant Currency; as well as evidence of Claimant's prior and ongoing dispute with the Internal Revenue Service and the State of California Franchise Tax Board regarding allegations of *unpaid income tax due from these same gambling winnings.* Moreover, at no time during trial in the District Court did the government introduce *any* evidence to rebut Claimant's contention of lawful source for the seized currency through Las Vegas gambling winnings.

The Court of Appeals committed error in affirming the clear abuse of discretion committed by the District Court in its summary discounting of Claimant's *unrebutted evidence* of lawful source of the seized currency. This error is all the more egregious because the Court of Appeals violated the due process mandate of the United States Constitution, Amendment V, by refusing to follow the present rule of law: that the amount of currency, in

and of itself, cannot establish more than *suspicion of illegal activity*.

## CONCLUSION

In order to prevent overreaching by the government in its application of 21 U.S.C. Section 881(a)(6), this Honorable Court should settle important questions of Federal law which have not yet been addressed or settled. Federal jurisprudence requires a definitive decision concerning the application of the exclusionary rule to civil forfeiture proceedings; as well as a clear delineation of due process in terms of the factors and quantum of proof to be considered by the district courts regarding the governments' establishment of probable cause to justify a civil forfeiture pursuant to 21 U.S.C. 881(a)(6), before any burden of proof shifts to claimants.

Therefore, Petitioner $227,865.00 U.S. Currency, respectfully requests the Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>$277,865.00 UNITED STATES CURRENCY,<br>Defendant,<br>and<br>ERNEST HOUSE,<br>Claimant - Appellant. | No. 94-55796<br>D.C. No. CV-92-07487-JSL<br>MEMORANDUM*<br>(Filed Dec. 18, 1995) |

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Submitted December 13, 1995**
Pasadena, California

Before: ALDISERT*** FARRIS, and RYMER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

*** Hon. Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

Ernest House appeals from a judgment pursuant to 21 U.S.C. § 881(a)(6) forfeiting $227,865.00 that was furnished or intended to be furnished in exchange for a controlled substance, or was the proceeds of such an exchange. We have jurisdiction, 28 U.S.C. § 1291, and we affirm.

I

House contends that the district court erred when it denied his motion to suppress the evidence seized from his car, including the subsequently forfeited money, because the officer who pulled him over lacked probable cause to arrest him for carrying a pistol concealed within a vehicle. We reject the argument.

California Penal Code section 12025(a) provides in pertinent part that "[a] person is guilty of carrying a concealed firearm when he . . . (1) [c]arries concealed within any vehicle . . . any pistol . . . capable of being concealed upon that person." Cal. Pen. Code § 12025(a)(1).[1] Although a pistol isn't "concealed" for purposes of section 12025(a) merely because it is inside the vehicle, *see People v. Frost*, 125 Cal. App. Supp. 794, 796 (1932), it is enough to violate section 12025(a) if at least *some* part of the pistol is hidden from the view of an officer outside looking into the vehicle, *People v. Koehn*, 25 Cal. App. 3d 799, 802, 102 Cal. Rptr. 102, 104 (1972); *Wilson v. Porter*, 361 F.2d 412, 414, 416 (9th Cir. 1966);

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[1] The California Legislature amended section 12025 in 1992, but the amendment is not relevant to the issue raised in this case.

*People v. Hale*, 43 Cal. App. 3d 353, 356, 117 Cal. Rptr. 697, 698 (1974) (only automatic clip and ammunition for pistol hidden).

Here, the district court found credible the arresting officer's testimony that he couldn't see the pistol inside the car from where he was standing next to House's window, and that he first saw part of the pistol propped up against the transmission well on the driver's side floorboard only after House moved his right leg. House has failed to show either clear error as to these factual findings or an error by the court in applying the law to the facts. As we have concluded that the district court did not err by finding probable cause to arrest House, the exclusionary rule is inapplicable in this case even though House correctly notes that it can be applied in what he calls "quasicriminal" forfeiture proceedings. We therefore conclude that the district court did not err in holding that the officer had probable cause to arrest House for violating section 12025(a), and thus did not abuse its discretion by denying House's motion to suppress the evidence offered at the forfeiture trial.

II

House next contends that the district court erred by finding that he failed to prove by a preponderance of the evidence that the seized money was not drug related in light of House's evidence that he won the money through years of lucky gambling in Las Vegas and that he was transporting the money in the trunk of his car from his business safe to his home. Again, we disagree.

The relevant civil forfeiture provision of the Controlled Substances Act, 21 U.S.C. § 881(a)(6), provides for the forfeiture of seized money if it was "(1) furnished or intended to be furnished in exchange for a controlled substance; (2) traceable to such an exchange; or (3) used or intended to be used to facilitate a violation of federal drug laws." *United States v. $191,910 in U.S. Currency*, 16 F.3d 1051, 1071 (9th Cir. 1994). Before such a forfeiture will lie, the government must initially establish probable cause to believe that the seized money was connected to drugs. 21 U.S.C. § 881(d); 19 U.S.C. § 1615; *United States v. $5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986). If it does, the burden then shifts to the claimant to prove by a preponderance of the evidence that the money was not involved with an illegal drug transaction. *Id.* at 1363. If the claimant fails to carry this burden, the money is forfeited.

The district court did not err by concluding that the government met its initial burden to show probable cause. First, the mere presence of almost a quarter of a million dollars in House's trunk is itself "strong evidence that the money was furnished or intended to be furnished in return for drugs." *United States v. $93,685.61 U.S. Currency*, 730 F.2d 571, 572 (9th Cir.) (per curiam), *cert. denied*, 469 U.S. 831 (1984); *United States v. Padilla*, 888 F.2d 642, 645 (9th Cir. 1989). Second, the fact that House was carrying that amount of money in his trunk at 2:00 a.m., and that he was armed with a pistol at the time, is persuasive circumstantial evidence to support probable cause. *See $93,685.61*, 730 F.2d at 572. Third, House's apparent failure to file legitimate tax returns for several prior years, and his obvious attempt to fabricate such returns to show

a legitimate source, also are relevant to the probable cause issue. *Id.*

The district court also did not commit clear error by finding that House had failed to prove by a preponderance of the evidence that the seized money was unrelated to drug trafficking. House and his accountant testified at the trial, attempting to establish a legitimate source for the money, but the district court found their testimony incredible. "Trial court determinations based on witness credibility are given special deference," *Padilla*, 888 F.2d at 645, and House offers no basis on which to overturn the district court's credibility and factual findings as clearly erroneous.

AFFIRMED.

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

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|---|---|
| UNITED STATES OF AMERICA, Plaintiff, v. $227,865.00, Defendant. | ) CV 92-7487 JSL ) ) JUDGMENT ) ) (Filed Apr. 20, 1994) |

This cause having been brought before this Court, the Honorable J. Spencer Letts, Judge presiding, and the Court sitting as the trier of fact, the issues having been duly tried by the Court, the Court hereby renders its JUDGMENT as follows:

It is ORDERED and DECREED that the defendant $227,865.00 is hereby FORFEITED to the plaintiff United States of America. Findings of fact and conclusions of law will follow.

IT IS SO ORDERED.

DATED: 4/20/94 /s/ Spencer Letts
J. Spencer Letts
United States District Judge

THIS CONSTITUTES NOTICE OF ENTRY REQUIRED BY FRCP, RULE 77(d).

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LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
ERIC HONIG
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Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>$227,865.00 U.S. CURRENCY,<br><br>Defendant. | ) NO. CV 92-7487-JSL(Sx)<br>)<br>) NOTICE OF LODGING<br>) OF REPORTER'S<br>) TRANSCRIPT OF<br>) COURT'S FINDINGS OF<br>) FACT AND<br>) CONCLUSIONS OF<br>) LAW |
| ERNEST HOUSE,<br><br>Claimant. | ) |

Plaintiff, the United States of America, hereby lodges the attached reporter's transcript of this Court's findings

of fact and conclusions of law in the above-entitled action.

The findings of fact and conclusions of law are lodged pursuant to this Court's Order of April 18, 1994 and Fed.R.Civ.P. 52 and Local Rule 14.3.

DATED: April 28th, 1994.

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
ERIC HONIG
Assistant United States Attorney
Chief, Asset Forfeiture Section

/s/ William C. Cullen
WILLIAM C. CULLEN
Special Assistant
United States Attorney

Attorneys for Plaintiff

COPY

*UNITED STATES DISTRICT COURT*
*CENTRAL DISTRICT OF CALIFORNIA*

THE HONORABLE J. SPENCER LETTS, PRESIDING
UNITED STATES DISTRICT COURT JUDGE

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| vs. | ) | CV-92-7487-JSL |
| $227,865.00, | ) | |
| Defendants. | ) | |
| ERNEST HOUSE | ) | |
| Claimant. | ) | |

TRANSCRIPT OF PROCEEDINGS

Monday, April 18, 1994

Los Angeles, California

Decision

Terry Kramer, CVR
Official Reporter
United States District Court
419 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 680-1908

APPEARANCES:

For the United States of America:

Nora Manella
United States Attorney
300 North Los Angeles Street
Los Angeles, California 90012

BY: William Cullen
Special Assistant United States Attorney

For the Ernest House:

Law Offices of Neil Newson
9465 Wilshire Boulevard, Suite 610
Beverly Hills, California 90212

BY: Neil Newson
Attorney at Law

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Los Angeles, California, Monday, April 18, 1994

* * *

THE COURT: I'm actually prepared to rule. It's not going to change, although I will expect to receive proposed findings.

I think I'll say as a preliminary matter, I don't like trials, I don't think this case should have gone to trial, and you all have heard me say why. I think I said to both of you, when it was over I would know I didn't know, I don't know, I never have.

I think maybe if I were six people I'd know more; I might not, but I might. I know being one person I don't like the task, I never have, the task of fact finding, the task of any one person without support from anybody else saying this man is telling the truth, this man is not telling the truth, I think is a very, very regrettable function which I don't take on – well, I guess I take it on willingly because I'm here, but that's as far as I can go.

With that said, treating the issues in the order that I heard them, I think the concealment issue is a nice issue were it before me as a matter not of probable cause but rather of actual concealment in a criminal case subject to reasonable doubt, I would have a reasonable doubt and I would hold for the defendant.

It isn't; the question is, did the circumstances create the probable cause for believing that it was concealed in accordance with the dictionary definition. My answer to that is yes.

As I understood the testimony, and I heard it, that's not where it's going to be if it's going to be left in plain view.

As I understood it – somebody correct this; it probably won't make any difference, so you'll want to be the one that corrects it – as I understood it, it was near the center divider concealed by his right foot.

If you were just trying to put it in an unconcealed spot, I don't know that that's the place that I would expect to find a loaded or unloaded gun, right next to the accelerator with the foot. I guess that's not where I would expect to find it. That does and did lead me to the

conclusion that it was put there for some purpose other than simple repose.

I simply don't believe that that gun was put there just because it's a good place to put it with the expectation of it being in plain view, so I don't believe that. Since I don't believe that, more probably than not I think it's pretty clear that I would have to think it was probable cause to arrest for it.

From there I'm into the other. The other I would say the following; there's too much coincidence, the money and cash doesn't have to really be explained by a bursting pipe, just somehow that day there's a bursting pipe where you have to get this money, which is $200,000 – only 20 of which is shown to be in there any time soon – all right, but then as it happens, it's a person who has the way to beat the odds in Las Vegas.

Surely there are people like that. I don't know if this defendant is one of them or not, but there aren't that many of them that one could expect them to have a bursting pipe this night while they also had a gun in their car and got arrested.

Then as it happens, the person to whom that happened is somebody who does not pay his taxes. Failure to pay taxes is itself a dishonest act, and it is the kind of act that casts doubt on people's credibility in all events. And, frankly, I don't believe that either.

Lastly – and this I'm going to say directly to you, Mr. House, because if I'm wrong, I really feel very badly about it – I watched your testimony and the way you

gave it very carefully. I concluded then and I still think you're a very bright man who is a very good actor.

You ran through the entire range of emotions on the stand, every emotion that a witness can bring out on the witness stand came out in your testimony; despondence, resignation, anger, humor, salesmanship, a very impressive display, a very impressive display, but at least to me, not convincing.

So that by itself would have troubled me if I hadn't had all of this coincidence which I didn't believe, there's too much of it. I would have been troubled to hear that polished a display from the witness stand. Again, not unimpressive, just troublesome, coupled with way, way, way too many coincidences to really fit together.

This is sort of out of place, but I am explaining because I really don't like this function. I once had a case brought – it was a fraud – and it was a series of impossibilities. This can't be true, this can't be true, this can't be true, this can't be true about 10 things in this effort.

Well, you looked at the first one, it was possible. It was possible, surprise, surprise. You looked at the second one, it was possible, too, even though you would never have believed it was even possible. You looked at the third one, it's possible, too.

The purpose of the scam was by the time you got to the bottom line, having discovered that so many things that you would believe were impossible were in fact possible, that you would believe that the bottom line was also possible without ever thinking that a one-half percent chance times a one-half percent chance times a one-

half percent chance times a one-half percent chance is a zero chance.

That is my perception of this case the way I heard it. Anything is possible, that's why I don't like having this function, but the things that I was asked to believe were all possible, at the same time were too many for me to believe were more likely than not, and I don't.

If I'm wrong, that's really one of life's great tragedies. I don't have the choice to say I don't know so I won't decide, I don't know so I wish you'd settled this case at whatever it should have been settled at, I don't have that option.

This is a simple yes-no decision; do I believe all those coincidences happened or do I not believe it, and the answer is, I don't, so I truly hope that I'm right, because if I am wrong, this is a horrible decision.

It's a grossly unfair, grotesquely unfair decision to have one man guess off truth and be wrong and basically take this amount of money away from somebody who should have it himself, but I don't have the option. I wish you had given me a different way out, but you didn't, so here we are.

More probably than not, which is the standard, I think – the probable cause, I'm holding that as a matter of law – on the facts before me, I think you definitely had probable cause regardless of anything else I believed. As to the rest of it, there are just too many things to ask me to believe them all and I can't, and so I don't.

Mr. Cullen, will you give me proposed findings?

MR. CULLEN: Yes, Your Honor.

THE COURT: Thank you.

We'll be in recess.

MR. NEWSON: Thank you, Your Honor.

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*CERTIFICATE*

*I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPTION, REPORTED TO THE BEST OF MY ABILITIES, OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.*

/s/ Terry Kramer
*TERRY KRAMER*
*CERTIFIED VERBATIM*
*REPORTER*

4/26/94
*DATE*

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CERTIFICATE OF SERVICE BY MAIL

I, ROSALIN R. DAVIS, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is the Office of the United States Attorney, 300 North Los Angeles Street, Los Angeles, California 90012, Room 7516, Federal Building; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on May 2, 1994, I deposited in the United States mails in the United States Federal Building at 300 North Los Angeles Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of NOTICE OF LODGING OF REPORTER'S TRANSCRIPT OF COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

addressed to: Neil Newson, Esq.
9465 Wilshire Blvd., Suite 610
Beverly Hills, Ca. 90212

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on May 2, 1994, at Los Angeles, California. I certify under penalty perjury that the foregoing is true and correct.

/s/ Rosalin R. Davis
ROSALIN R. DAVIS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>$277,865.00 UNITED STATES CURRENCY,<br>Defendant,<br>and<br>ERNEST HOUSE,<br>Claimant - Appellant. | No. 94-55796<br>D.C. No. CV-92-07487-JSL<br>ORDER<br>(Filed Jan. 30, 1996) |

Before: ALDISERT*, FARRIS and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing. Judge Rymer votes to reject the suggestion for rehearing en banc and Judges Aldisert and Farris so recommend.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

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* Hon. Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS,
NINTH APPELLATE CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>Plaintiff/Appellee,<br><br>vs.<br><br>$227,865.00 UNITED STATES CURRENCY,<br><br>Defendant/Appellant<br><br>ERNEST HOUSE,<br><br>Claimant. | U.S. COURT OF APPEALS DOCKET NO: 94-55796<br><br>LOWER COURT DOCKET NUMBER: CV-92-07487-JSL (RS)<br>(C.D. CALIF.)<br><br>PRESENTMENT OF ADDITIONAL CITATIONS PURSUANT TO NOTICE OF THE COURT |

**COMES NOW** Appellant and hereby presents additional citations of relevant decisions rendered since the filing of Appellant's last brief:

1. *United States vs. $5,000.00 IN U.S. CURRENCY (6th Cir. 1994) 40 F.3d 846;*

2. *United States vs. $30,060.00* (9th Cir. 1994) 39 F.3d 1039;

3. *United States vs. Real Property Located at 20832 Big Rock Drive, Malibu, Ca. 90265* (9th Cir. 1995) 51 F.3d 1402; as to headnote 7, pages 1406-1407.

DATED: November 16, 1995

Respectfully submitted:

BY: /s/ Neil C. Newson
NEIL C. NEWSON
NEIL C. NEWSON & ASSOCIATES
9465 Wilshire Blvd., #610
Beverly Hills, CA 90212
(310) 278-7555
Attorney for Claimant
Ernest House

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PROOF OF SERVICE BY MAIL 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of eighteen years and my business address is 9465 Wilshire Boulevard, Suite 610, Beverly Hills, California 90212.

On November 16, 1995, I served the foregoing document(s) described as **PRESENTMENT OF ADDITIONAL CITATIONS PURSUANT TO NOTICE OF THE COURT** on the interested parties in this action as follows:

XXXX Via Mail by placing copies thereof enclosed in a sealed envelope with postage fully prepaid, in the U.S. Mail at Beverly Hills, California, addressed to:

**SEE ATTACHED SERVICE LIST**

_____ Via Personal Service: on interested parties by placing a true copy thereof enclosed in a sealed envelope into the hands of the addressee as follows:

_____ Via FAX: I transmitted a true copy of said document by Facsimile machine, pursuant to Rule 2005. The Facsimile machine used complied with Rule 2003(3) and no error was reported by said machine. Said FAX transmission(s) occurred at on the below written date. Said Fax transmission(s) were directed as follows:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the 16th day of November, 1995, at Beverly Hills, California.

/s/ Alice Neal-Vaughan
ALICE NEAL-VAUGHAN

---

**SERVICE LIST**

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